No. 12,509

IN THE

United States Court of Appeals

For the Ninth Circuit

THOMAS E. HAYES, et al., on Behalf of Himself and All Others Similarly Situated,

Appellants,

vs.

UNION PACIFIC RAILROAD CO. (a corporation) and DINING CAR EMPLOYEES UNION LOCAL 372 (a voluntary unincorporated labor organization); and JAMES G. BARKDOLL, as District Director of said Local 372 in the District of Los Angeles, State of California,

Appellees.

APPELLANTS' PETITION FOR A REHEARING.

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Appellees.

APPELLANTS' PETITION FOR A REHEARING.

To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

The petition of appellants Thomas E. Hayes, et al. for rehearing herein, respectfully alleges as follows:

I.

THE OPINION OF THE COURT APPEARS TO BE PREDICATED UPON A COMPLETE MISCONCEPTION OF THE RECORD.

This misconception is expressed in the following sentence:

> "It was not claimed below nor here that the collective bargaining agreement executed by respondent Union, as the bargaining representative of the employees, and respondent Railroad, in any manner by its terms, directly or *indirectly* provided for any discrimination against appellants. Appellants claimed below that the *conduct of the respondent in performing the agreement was discriminatory.*" (Emphasis added.)

Neither of the above statements is correct. It is true that appellants have conceded that the language of the agreement in and of itself and divorced from every other factor in the case, is not discriminatory. The concession merely means that there is no language in the agreement which specifically provides that, when initially employed, all Negro cooks shall merely because of race be assigned a seniority date in Group B whereas all white cooks purely on racial grounds, shall be assigned a seniority date in Group A. The pleadings show that when the collective bargaining agreement was made, this racially discriminatory practice was in existence; that the alphabetical group system of seniority was placed in the agreement for the express purpose of perpetuating this discriminatory arrangement, and that all of the appellants, when initially hired, were the victims of it. (Tr. 155-156.)

Appellants pointed out that the agreement itself contained no yardstick for determining who, upon initial hiring, should be assigned seniority dates in Groups A, B, or C, and the matter was left solely to chance. The yardstick, however, is found outside of the agreement. The discriminatory practice, in the light of which the agreement was negotiated, constitutes the yardstick which is a simple and easily applied formula—all Negroes in Group B, all whites in Group A. It is as if a secret code was incorporated in the agreement; Group B means Negro. Group A means white. Without, however, the discriminatory practice, the alphabetical system of seniority groups is meaningless; but in the discriminatory practice is the key to an otherwise meaningless classification.

The vice does not lie in the practice, but in a skillfully devised system of seniority which becomes intelligible only when the discriminatory practice furnishes the key to its application.

The alphabetical system of group seniority, in the absence of standards set forth in the agreement for determining the qualifications necessary for admittance to the several groups, is devoid of any meaning or significance and can serve no other purpose than to permit the continued existence of the discriminatory practice. This being the purpose of the agreement, it can hardly be denied that the discrimination grows out of the collective bargaining process.

For further discussion of this point, see appellants' opening brief, pages 19 and 20, and appellants' closing brief, pages 21-23.

II.

THE DECISION OF THIS COURT IN EFFECT NULLIFIES THE LEGALLY SOUND AND ETHICALLY CORRECT DECISIONS OF THE SUPREME COURT IN THE CASES OF STEELE v. LOUISVILLE AND NASHVILLE RR. CO., 323 U.S. 192, 89 L. Ed. 173, AND TUNSTALL v. BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, 323 U.S. 210, 89 L. Ed. 187.

The decision in this case is notice to railroads and complacent unions that all that is necessary to avoid the prohibition against discrimination established in the *Steele* and *Tunstall* cases is to confine discrimination to practice. Avoid any provisions in the collective bargaining agreement for racial discrimination in terms, but be sure to insert some provision which is meaningless until construed in the light of a discriminatory practice and which can have no other purpose than perpetuation of the practice. The decision of the Court in the instant case is, it is submitted, in effect a guidepost to those subject to the Railway Labor Act pointing the way by which discrimination can be easily accomplished if care is taken to draw a contract which does not in express terms provide for discrimination exclusively on the ground of race, but which becomes discriminatory when interpreted and applied by means of an existing discriminatory practice.

III.

APPELLANTS WERE DENIED DUE PROCESS OF LAW BY THE COMPOSITION OF THE COURT.

The Court was composed of the Honorable William E. Orr, Circuit Judge; Honorable Louis E. Goodman,

District Judge, and Honorable Dal M. Lemmon, District Judge. The two District Judges came from the same district in which Honorable Michael J. Roche is Senior Judge. The decree appealed from was made by Judge Roche. The Court was therefore composed of one Appellate judge and two District judges from Judge Roche's District, but junior to him. Under these circumstances an unjust burden was placed upon them. Only with the greatest reluctance would either have reversed Judge Roche. An Appellate Court of such composition is, it is respectfully submitted, an appellate body in name only. To compel appellants to submit their appeal to such a body is a denial of due process of law and tends to negate the appellate process.

Wherefore, appellants pray that the order affirming the judgment of the Court below be set aside and that a rehearing may be had before an impartially constituted court of appeal.

Dated, San Francisco, California,
September 20, 1950.

Respectfully submitted,
HAROLD M. SAWYER,
Solicitor for Appellants and Petitioners.

ARCHIBALD BROMSEN,
GLADSTEIN, ANDERSEN, RESNER & LEONARD,
Of Counsel.